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## VIA ELECTRONIC COMMENT FILING SYSTEM

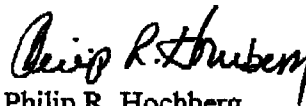
Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Room TW-A325  
Washington, D.C. 20554

Re: *Digital Broadcast Copy Protection*  
MB Docket No. 02-230

Dear Ms. Dortch:

Enclosed for inclusion in the above-referenced docket are the joint comments of National Football League, Office of the Commissioner of Baseball, National Basketball Association, National Hockey League, Women's National Basketball Association, National Collegiate Athletic Association, PGA TOUR, Inc., and Ladies Professional Golf Association, in response to the Commission's Notice of Proposed Rulemaking, FCC 02-231 (released Aug. 9, 2002).

Sincerely,



Philip R. Hochberg  
Paul W. Jamieson

PWJ/eo  
Enclosure

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Digital Broadcast Copy Protection	)	MB Docket No. 02-230
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**COMMENTS OF  
NATIONAL FOOTBALL LEAGUE,  
OFFICE OF THE COMMISSIONER OF BASEBALL,  
NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL HOCKEY LEAGUE,  
WOMEN'S NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PGA TOUR, INC.,  
and LADIES PROFESSIONAL GOLF ASSOCIATION**

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## SUMMARY

Professional and Collegiate Sports distribute a significant percentage of over-the-air programming that is among the most popular programming in the country and that will have even greater appeal for consumers when viewed in a digital format. Professional and College Sports support the creation of a redistribution control regime for digital broadcast television signals (although these comments largely do not reach the technical sufficiency of the Broadcast Flag and the other specific proposals of the Broadcast Protection Discussion Group (the “BPDG”)). Without such a mechanism to give content owners incentives to make content available in a digital format, the DTV transition -- and the future of over-the-air television generally -- is at risk.

In general, Professional and Collegiate Sports support the BPDG’s proposal as one that balances the need to protect content (while allowing for copying for time-shifting purposes) and does not inhibit innovation. Professional and Collegiate Sports do urge specific examination and legislative and/or regulatory efforts to address unauthorized copying posed by the “analog hole,” although this issue is not raised in the NPRM or in the work of the BPDG. In addition, Professional and Collegiate Sports submit that application of fair use principles to the redistribution of digital broadcast signals should result in a much more limited scope of fair use than in other contexts.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Digital Broadcast Copy Protection	)	MB Docket No. 02-230
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**COMMENTS OF  
NATIONAL FOOTBALL LEAGUE,  
OFFICE OF THE COMMISSIONER OF BASEBALL,  
NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL HOCKEY LEAGUE,  
WOMEN'S NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PGA TOUR, INC., and  
LADIES PROFESSIONAL GOLF ASSOCIATION**

The National Football League ("NFL"), Office of the Commissioner of Baseball ("Baseball"), the National Basketball Association ("NBA"), the National Hockey League ("NHL"), the Women's National Basketball Association ("WNBA"), the National Collegiate Athletic Association ("NCAA"), the PGA TOUR, Inc. ("PGA TOUR" or "Tour") and the Ladies Professional Golf Association ("LPGA") (collectively, "Professional and Collegiate Sports") respectfully submit these comments in response to the Notice of Proposed Rulemaking in the above-referenced docket,<sup>1</sup> which seeks comment on a number of issues surrounding the unauthorized copying and redistribution of digital broadcast content.

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<sup>1</sup> *In the Matter of Digital Broadcast Copy Protection, Notice of Proposed Rulemaking*, MB Docket No. 02-230, FCC 02-231 (released Aug. 9, 2002) (the "NPRM").

## **I. Introduction and Statement of Interest**

### **A. National Football League**

Broadcast of the games of the NFL's thirty-two member clubs constitutes some of the most popular television programming in the country. The primacy of broadcast distribution of NFL content is singular among professional team sports; all NFL games are broadcast on free over-the-air television.<sup>2</sup> As a supplement to its over-the-air distribution, the NFL also offers "NFL Sunday Ticket," which allows satellite subscribers to receive all Sunday afternoon games.<sup>3</sup> In addition, there is a significant secondary market for NFL games, including highlights and/or complete games licensed by the NFL or its member clubs, in programming such as HBO's "Inside the NFL," Turner Classic Sports, NFL Films, and on shows of local broadcast network affiliates.<sup>4</sup> The NFL holds the copyright to the telecasts of all pre-, regular, and post-season games, and earns rights fees by licensing its telecasts.

### **B. Office of the Commissioner of Baseball**

Baseball has a long history of making league games available both nationally and regionally through over-the-air telecasts. More Baseball games are shown on over-the-air broadcast television each year than any other professional sport. Each of Baseball's most popular and widely-viewed games – the All-Star Game and the World Series – are broadcast over-the-air by a national broadcast network. Baseball also makes its programming available through its cable network partners such as ESPN, which broadcasts regular season games, as well as "Baseball Tonight," a show that includes exclusive highlights from ongoing games. Baseball's production arm, MLB Productions, creates the popular weekly series, "This Week in

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<sup>2</sup> One weekly game is on ESPN, which is available over-the-air in the home markets of the two teams participating, subject to the NFL's blackout rule.

<sup>3</sup> These games are subject to being blacked out locally if they are not sold out.

<sup>4</sup> The use of post-game video clips of NFL games is of particular concern. Not even the NFL's network carriers may distribute these other than for specified "news" purposes.

Baseball,” in addition to other highlight or baseball-related programs. Baseball also makes an extensive number of out-of-market games available to DirecTV subscribers through the “Extra Innings” package.

C. National Basketball Association

NBA regular season and playoff games are broadcast over-the-air on the ABC network; the league also has a broadcast package with Telemundo. In addition, the NBA has agreements with cable networks ESPN and TNT. Recently, the NBA launched its own national digital network, NBA TV, which will carry live games starting January, 2003. “NBA League Pass” is a supplementary offering distributed through DirecTV, EchoStar and iN DEMAND, through which fans can get even more NBA games. NBA teams also license their programming locally over broadcast stations and regional cable networks. NBA Entertainment produces programming for broadcast, cable and satellite networks, such as “Inside Stuff,” available over-the-air on ABC, and “NBA Action,” a highlight show syndicated locally to cable and broadcast outlets. Internationally, the NBA licenses pre-season, regular season and playoff games to well over 200 countries for broadcast, cable, satellite and other forms of distribution.

D. National Hockey League

With 30 teams in the U.S. and Canada, the NHL is in the midst of five-year national contracts with ABC and ESPN, as well as three national contracts with Canadian networks, for regular season and playoff telecasts. In addition, all clubs originate regular season games locally and regionally, using over-the-air television or cable. Moreover, the NHL distributes a league-wide out-of-market package of games through “NHL Center Ice,” seen on both DirecTV and EchoStar, and to digital cable in the U.S. through iN DEMAND.

E. Women's National Basketball Association

Beginning with the 2003 season, the WNBA will begin broadcasting its games over-the-air on ABC and on Telemundo. WNBA game and non-game programming is also shown on ESPN2 and Oxygen cable networks. NBA TV will also carry WNBA games. Teams likewise license games for local broadcast and cablecast. The WNBA produces the "WNBA Action" highlight show, which is available on cable.

F. National Collegiate Athletic Association

The NCAA is a voluntary association of approximately 1,200 colleges and universities involved in intercollegiate athletics. Of its 87 men's and women's championships in 22 sports, a number are broadcast over-the-air nationally, pursuant to the NCAA-held copyright. These include the Men's and Women's Division I Basketball Championships, among the most popular television programming in the country.<sup>5</sup> In addition, satellite subscribers can purchase "March Mega Madness," which provides access to the non-locally broadcast first three rounds of the Division I Men's Basketball Tournament. And, beginning in 2003, every out-of-market Women's Basketball Championship Tournament game will be available through ESPN "Full Court."

G. PGA TOUR

PGA TOUR operates three tours: the PGA TOUR, the Champions Tour, and the Nationwide Tour; and co-sanctions the World Golf Championships. The Tour is the exclusive copyright holder of coverage of all of these events. For the 2003-2006 period, the Tour has licensed rights to the ABC, CBS, and NBC broadcast networks, as well as to ESPN, USA Networks, and The Golf Channel as cable and satellite distributors. The Tour and its network

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<sup>5</sup> The NCAA has no control or television rights over regular season college games in any sport, which belong to the institutions or conferences. NCAA member institutions and conferences offer a huge volume of over-the-air programming, including regular season games, conference post-season competition, Division I-A football bowl games, and all-star games.



partners also produce and distribute worldwide significant amounts of preview, review, and other highlight programming.

#### H. Ladies Professional Golf Association

LPGA golf has been televised for over twenty years; more than thirty million households currently watch LPGA tournaments on over-the-air broadcast and cable television in a season in the U.S. The LPGA has licensed rights domestically to NBC, ABC, CBS, ESPN, TNT, and The Golf Channel. Internationally, LPGA tournaments are currently distributed in over 180 countries and reach approximately a half-billion households each year. The LPGA holds the copyright to the tournament telecasts and earns rights fees from any redistribution thereof.

#### I. Summary of Argument

As they have stated in the Commission's Interactive Television<sup>6</sup> and Digital Must-Carry proceedings,<sup>7</sup> sports programmers have a strong interest in the success of the digital television ("DTV") transition. Sports programming has the potential to be some of the most captivating content for consumers when viewed in a digital format, and certain sports are already experimenting with interactive content that is predicted to be part of the advanced television services made possible by digital television.<sup>8</sup> The business models of many Professional and Collegiate Sports, which make sports programming widely available over-the-air, often depend on local or regional telecasts that balance the plethora of games available over-the-air and the promotion of fan attendance.<sup>9</sup> The fact that much of their programming is available over-the-air

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<sup>6</sup> See, e.g., Comments of the NFL in CS Docket No. 01-7, *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, Notice of Inquiry, filed March 19, 2001 ("NFL ITV Comments").

<sup>7</sup> See, e.g., Comments of the NFL ("NFL DTV Must-Carry Comments") and Comments of NHL and PGA TOUR ("NHL/PGA TOUR DTV Must-Carry Comments") in CS Docket Nos. 98-120, 00-96, and 00-2, *Carriage of Digital Television Broadcast Signals, Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, Further Notice of Proposed Rulemaking, filed June 11, 2001.

<sup>8</sup> See, e.g., NFL ITV Comments, at 2; NHL/PGA TOUR DTV Must-Carry Comments, at 4.

<sup>9</sup> The importance of regional telecasts to Professional and Collegiate Sports is demonstrated in their aggressive advocacy for application of the sports blackout rule. See, e.g., the separate comments of the NFL, the NHL and (footnote continued to next page)

and that preservation of their local or regional distribution is crucial to many of their individual business models gives Professional and Collegiate Sports a particular interest in ensuring that unauthorized redistribution of digital broadcast signals is not permitted to occur.

Professional and Collegiate Sports file comments in the instant proceeding in order to support the creation of a redistribution control regime for digital broadcast signals. Although these comments largely do not reach the sufficiency of the specific Redistribution Control Descriptor referenced in the NPRM (“Broadcast Flag”),<sup>10</sup> Professional and Collegiate Sports support in principle the framework adopted under the auspices of the Broadcast Protection Discussion Group (“BPDG”) as one that balances the need to protect content (while allowing for copying for time-shifting purposes) and does not inhibit innovation. Professional and Collegiate Sports do urge specific examination and legislative and/or regulatory efforts to address unauthorized copying and redistribution posed by the “analog hole,” as more fully explained below.

## **II. The Need For a Regulatory Redistribution Control Mechanism**

The threshold question posed in the NPRM, at paragraph three, is whether a copy protection scheme for digital broadcast television is needed. Professional and Collegiate Sports submit that a robust and comprehensive system for inhibiting the unauthorized redistribution of digital broadcast television is an essential precondition to copyright owners making content available in a digital format and, thus, for creating a successful and swift DTV transition. The ease of piracy (as well as the quality of the pirated copy) will be greatly increased once broadcasters transition from analog signals to digital transmissions, if a comprehensive anti-

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*(footnote continued from previous page)*

Baseball in CS Docket No. 00-2, *Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, Notice of Proposed Rulemaking* (filed February 7, 2000).

<sup>10</sup> NPRM, at ¶ 2.

piracy system is not in place. As the Commission has recognized, digital copies “can be replicated pristinely and distributed in near-perfect condition.”<sup>11</sup> Even with sports programming, which is most valuable at the time of its live occurrence, the threat and market effects of unauthorized redistribution of digital copies would be substantial. As more of the world’s Internet subscribers migrate to broadband connections, these near-perfect copies of digital broadcast television signals will be able to be redistributed, in full-motion, virtually simultaneously with their broadcast.<sup>12</sup> Technical impediments to such redistribution of broadcast television over the Internet are temporary and, indeed, have already been substantially mastered in making analog signals available without the copyright owners’ permission.<sup>13</sup> Without adequate safeguards, content owners would have a disincentive to offer content in a digital format, if that content may be instantly redistributed to a virtually unlimited number of recipients across the country and around the world. In short, prevention of unauthorized redistribution of digital broadcast content is an essential catalyst to jumpstarting the stalled DTV transition.<sup>14</sup>

The certain consequences of the lack of such a redistribution control mechanism for digital broadcast signal transmission of Professional and Collegiate Sports -- many of whose business models depend on local or regional telecasts -- aptly illustrate this point. For example, if NFL, Baseball, or NBA telecasts could be redistributed across the country and around the world, the delicate economic model of regional telecasts would be threatened, and Commission

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<sup>11</sup> *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, ¶ 107 (2000).

<sup>12</sup> The Commission predicts that 55.7% of American households will access the Internet through broadband facilities by 2004. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 17 FCC Rcd 1244, ¶ 43 (2002).

<sup>13</sup> Before an injunction was put in place against it, iCraveTV was retransmitting U.S. broadcasts signals over the Internet. See Permanent Injunction Order, *20<sup>th</sup> Century Fox Film Corporation et al. v. iCraveTV, et al.*, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. 2000) (No. 00-121).

<sup>14</sup> For a cogent discussion of the risks associated with digital piracy generally, see the remarks of Peter Chernin, News Corporation/Fox Group, at Comdex Fall 2002, Tuesday, November 19, 2002, available at [http://www.comdex.com/news/fall2002/index.php?d=keynotes&s=common&c=key\\_chernin](http://www.comdex.com/news/fall2002/index.php?d=keynotes&s=common&c=key_chernin).

rules designed to support that model would be rendered meaningless.<sup>15</sup> The value of the television rights fees earned by certain sports for distributing games regionally and the ability to secure regional distribution would dramatically decrease. Likewise, a Philadelphia resident whose telecast of the Eagles game is blacked out because it has not sold out would have no incentive to buy a ticket to the game if he could simply watch it on his PC over a broadband connection from a source outside of the Philadelphia area who does receive the digital broadcast signal over-the-air.<sup>16</sup> Blackout policies and the Commission's sports blackout rule would be greatly weakened by a widely available means (copying digital broadcast and redistributing via a broadband Internet connection) of circumvention.

Secondary markets for sports programming, such as highlight shows and airing of "classic" past games or events, would also be adversely affected; any consumer with a PC and a digital editing device (available on most PCs sold today) could create and distribute his own library of highlights or archived "classic" games, which could be copied perfectly and redistributed to a virtually unlimited audience. If fans could get highlights of a professional sports game through a Web site established for such purposes (or an even more anonymous "news group" dedicated to such content), those fans would have less interest in tuning into programs such as "Inside the NFL" or "This Week in Baseball" or "NBA Action" for a recap of action or in purchasing highlight tapes. As sports leagues begin to create their own networks

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<sup>15</sup> While they generally have no direct interest in the value of regional advertising generated by their network telecasts, Professional and Collegiate Sports note that the lack of a redistribution control scheme for digital broadcast signals could upset the value of an affiliate's contract with a network, which is enhanced by having local advertising availability in the telecasts. For example, if a fan could access Major League Baseball games from all over the country over his PC, the value of the advertising spots in the MLB telecast in the fan's area would decrease -- as well as the value of the package to the network and its affiliates -- as these alternative sources of games would draw viewers away from the local telecast.

<sup>16</sup> Similarly, if a fan of the Packers who lives in San Diego (often referred to as a "displaced" fan) could receive by e-mail or file transfer protocol a copy of Sunday's Packer game virtually in real time from his brother in Green Bay, who receives and copies the digital broadcast to his hard drive, that fan would have less incentive to purchase NFL Sunday Ticket.

(such as the NBA's NBA TV), unauthorized redistribution of digital content over the Web would likely have even more damaging consequences.

The detrimental effects for sports programming of the lack of a redistribution control mechanism would not be limited to the U.S. market. Each sport has invested in varying degrees in the promotion of its products internationally. The absence of a robust mechanism for preventing redistribution of digital transmissions from the U.S. to fans in other countries would undercut efforts to establish broadcast or cable networks overseas. In the present nascent state of digital transmission, the NFL already distributes its programming in Canada, Mexico, Great Britain, and Japan. Baseball recently made telecasts of its post-season games available over the Internet for fans living or traveling outside the United States and Japan.<sup>17</sup> Following the selection and signing of Chinese national Yao Ming by the Houston Rockets, the NBA entered into agreements with six provincial television networks in China for broadcast of Rockets games.<sup>18</sup> The potential value of those contracts would drop precipitously if large numbers of fans overseas could easily receive Internet transmissions of games telecast in the U.S. Not only would the host countries and their broadcast networks be less willing to enter into licensing agreements, but the value and exposure (such as in preferred time slots) they would give Professional and Collegiate Sports' product would be diminished. The prospect of large numbers of fans overseas with broadband Internet connectivity may seem remote now, but it is a possibility that would work at cross purposes to any sports league's promotional efforts outside the U.S.<sup>19</sup>

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<sup>17</sup> See [http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb\\_com\\_press\\_release.jsp?ymd=20020930&content\\_id=141823&vkey=pr\\_mlbcom&fext=.jsp](http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_com_press_release.jsp?ymd=20020930&content_id=141823&vkey=pr_mlbcom&fext=.jsp)

<sup>18</sup> *A Basketball Star From Shanghai is Big Business*, Wall Street Journal, October 22, 2002, at A1.

<sup>19</sup> Conversely, any U.S.-adopted redistribution control regime would be weakened by the lack of similar prohibitions on unauthorized distribution of DTV signals by neighboring countries whose residents can receive digital telecasts of U.S. broadcast signals. Accordingly, while international cooperation is beyond the scope of the instant proceeding, Professional and Collegiate Sports urge that the Commission and other U.S. government agencies work closely with Canada and Mexico toward adoption of a uniform set of enforceable standards for preventing the unauthorized distribution of U.S. digital television signals received over-the-air.

Each of the leagues' Web ventures also would be adversely affected by the lack of a comprehensive and effective scheme to prevent digital transmissions from being copied and redistributed over the Internet. For example, the NCAA sold all the rights to Internet transmission of its championship games to its network partner, CBS.<sup>20</sup> Baseball is currently experimenting with a plan to charge for Webcasts of select games in the U.S. (as well as the international Web ventures previously discussed).<sup>21</sup> These telecasts are encrypted to prevent piracy and are blacked out in the home teams' markets. The NHL has teamed with Microsoft to offer NHL Highlight Machine, which allows fans to search and watch highlights and classic NHL games on the Web.<sup>22</sup> The NBA was the first sports league to make a game available over the Internet on an experimental basis. Professional and Collegiate Sports generally view their Web ventures as supplementary to the primacy of broadcast telecast of their contests. Nevertheless, they are important promotional tools and potential revenue streams. Without a mechanism in place to prevent the download and redistribution over the Internet of digital broadcast of games, fans will have little incentive to pay to access highlights and other sports content over the Web, when unauthorized perfect digital copies of that content are a mere mouse-click away.

### **III. Comments in Response to Specific Questions in the NPRM.**

The Commission requests comment on a number of issues related to the relationship of digital broadcast copy protection and the specific proposals of the BPDG and its Final Report, including the proposal for adoption of a Broadcast Flag.<sup>23</sup> While Professional and Collegiate

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<sup>20</sup> See NCAA News, December 6, 1999.

<sup>21</sup> *Sports Sites Future Out the Role of Webcast Games, as Television Remains the Medium of Preference*, New York Times, September 9, 2002, at C1.

<sup>22</sup> [http://nhl.com/intheslot/watch/video/prem\\_highlightmachine.html](http://nhl.com/intheslot/watch/video/prem_highlightmachine.html)

<sup>23</sup> Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group, June 3, 2002, available at <http://www.cptwg.org/Assets/BPDG/home%20page.htm> (the "Final Report").

Sports did not participate in the BPDG and do not reach specific technical questions that are obviously crucial to the adoption of a successful regime, they offer the following comments to questions raised in the NPRM.

A. General Comments

At paragraph three, the Commission seeks comment on the general long-term implications for the DTV transition.<sup>24</sup> Absent a robust and comprehensive mechanism to prevent widespread unauthorized distribution of digital broadcast television signals, the long term consequences for digital television – and the availability of free over-the-air television -- are dire.<sup>25</sup> When broadcast television is available exclusively in a digital format, and when broadband Internet connectivity supplants dial-up access as the dominant mode of Internet access, unauthorized redistribution of digital television is a certainty, if there are not measures designed to curtail such piracy. Without such measures, the risk is run that more television will migrate to conditional access services, such as cable and satellite, whose encryption of signals may assist in the prevention of unauthorized copying and redistribution of content.<sup>26</sup> Such widespread piracy of digital signals would present Professional and Collegiate Sports with difficult choices in order to protect their products, including consideration of movement away from free over-the-air broadcasts to conditional access platforms.<sup>27</sup> Professional and Collegiate Sports' business models would be irrevocably altered.

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<sup>24</sup> NPRM, at ¶ 3.

<sup>25</sup> The duration of the DTV transition is uncertain, and, absent other legislation, likely will extend beyond the 2006 target date set by Congress in the Balanced Budget Act. 47 U.S.C. § 309(j)(14). *See, generally, e.g., Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 17 FCC Rcd 15978 (2002). *See also, e.g.,* Peter J. Brown, 2006: *A DTV Odyssey—Broadcasters, Manufacturers Agree Spectrum Giveback in Six Years Highly Unlikely*, *Digital Television*, December, 1999 at 1, 6.

<sup>26</sup> Final Report, at Section 4.11.

<sup>27</sup> *See, e.g., Television Feeling Heat of Illegal Copying*, *Electronic Media*, April 9, 2001, at 15 (“Failure to secure [provisions for protecting digital content] could mean the demise of free over-the-air broadcasting as content players prefer to shift their live sports . . . . to more secure cable and satellite platforms . . . .”).

At paragraph four, the Commission seeks comment on whether rules are necessary to resolve outstanding issues relating to the scope of compliance, robustness and enforcement rules.<sup>28</sup> Commission rules on compliance are necessary to enforce the Broadcast Flag, or whatever solution is ultimately adopted.<sup>29</sup> As Commissioner Copps pointed out, the affected industries have had ample opportunity to reach a voluntary agreement but have not, as evidenced by the absence of consensus among BPDG participants in certain areas.<sup>30</sup> Given the need for a comprehensive and robust regime, there must be a regulatory architecture to ensure that all affected industries comply. To the extent additional legislation is necessary to end uncertainty about whether the Commission currently possesses jurisdiction to adopt such rules, Professional and Collegiate Sports urge Congress to act quickly to grant such jurisdiction over adoption of a comprehensive set of requirements for the protection of digital broadcast signals.<sup>31</sup>

#### B. “Analog Hole”

Professional and Collegiate Sports point the Commission to an issue not specifically raised in the NPRM but necessary to the creation of a comprehensive redistribution control mechanism. Section 2.5 of the Final Report explains that the Broadcast Flag proposal in the Final Report does not reach the “analog hole.”<sup>32</sup> Under the BPDG’s proposal, once digital content is processed through an analog output for viewing on an analog set, such content would

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<sup>28</sup> NPRM at ¶ 4.

<sup>29</sup> Whether or not the Broadcast Flag proposal of the BPDG is the right technology to achieve a sufficiently robust mechanism to prevent widespread unauthorized redistribution of digital broadcast television while allowing time-shifting is beyond the scope of these comments. To the extent interested parties wish to provide constructive criticism or alternative proposals, Professional and Collegiate Sports support such further input and participation, so long as any additional critique and/or alternate proposal is substantive, specific, timely and considered expeditiously.

<sup>30</sup> Final Report, at Section 5. *See also* NPRM, Concurring Statement of Commissioner Copps (“[A] decade of discussion has yielded no solution.”).

<sup>31</sup> Professional and Collegiate Sports do not include a discussion herein of the jurisdictional question posed by ¶ 10 of the NPRM. However, Professional and Collegiate Sports note that the Chairman and Ranking Minority Member of the House Energy and Commerce Committee have sent a letter to Chairman Powell opining that the Commission already possesses requisite authority under 47 U.S.C. § 336(b) to adopt such rules. *See* Letter from the Honorable W.J. “Billy” Tauzin and the Honorable John D. Dingell to Chairman Michael Powell, July 9, 2002.

<sup>32</sup> Final Report, at Section 2.5.



no longer be protected by the technologies required by the regulation. However, this conversion of digital broadcast signals to analog format leaves open the possibility that such content could be converted back to a digital format and subsequently distributed without authorization. These copies would not technically be digital copies, but they would be of a sufficiently high quality to pose an enormous threat. For that reason, the Broadcast Flag proposal, standing alone, does not provide a complete solution to digital content protection. Any solution that ultimately is adopted must not impede the ability of consumers with analog sets (who will be the vast majority of television households for the foreseeable future) to receive digital signals and convert them for viewing on analog sets.

Although this issue was not addressed in the Final Report and is not within the scope of the instant proceeding, some interested parties are examining the use of watermarks or other devices that may help address the problem,<sup>33</sup> and it is Professional and Collegiate Sports' understanding that a group organized under the auspices of the BPDG's Copy Protection Technical Working Group is examining this issue. Absent inter-industry consensus on procedures for plugging the "analog hole," the Commission or Congress should adopt rules or legislation to prevent unauthorized analog-to-digital conversion from being an "end-run" around digital broadcast redistribution protection.

C. Requirement to Embed the Broadcast Flag

Professional and Collegiate Sports believe that a requirement that content owners embed the Broadcast Flag in all digital broadcast television signals would not be in the public interest; the absence of such an all-encompassing mandate will not slow the DTV transition.<sup>34</sup> Content owners must be given flexibility to insist that certain content must be protected, while leaving

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<sup>33</sup> See <http://www.dvdcca.org>.

<sup>34</sup> NPRM, at ¶ 5.

other broadcasts free to be copied and redistributed, for example, for promotional purposes. Content owners have incentives to see that a substantial amount of content is embedded with the Broadcast Flag and therefore accorded protection when received in consumer electronics devices. However, it is possible that some content owners may want to leave some small amount of digital broadcast content free to be copied and widely redistributed, as an advertisement for their protected digital broadcasts. A mandate would substitute the Commission's judgment for evolving business strategies on how to market and distribute a product that is still in its infancy; there is no legal or policy justification for mandating the Broadcast Flag (or other comparable technology ultimately adopted) in all digital broadcast content.

Consumer electronics devices must recognize the Broadcast Flag and comply with whatever robustness, compliance and enforcement regulations are adopted to protect content from unauthorized redistribution.<sup>35</sup> Without this assurance, content owners would have no incentive to make content available in a digital format for broadcast over-the-air. In addition, the Commission should clarify that personal computers and all other devices that might be used to receive a digital broadcast signal (either directly or by retransmission) must recognize the Flag (or any technology ultimately adopted) and comply with whatever rules are adopted.

#### D. Approval of Future Technologies

Professional and Collegiate Sports do not opine on the specifics of the Final Report's proposed processes for technologies to become approved as sufficiently robust.<sup>36</sup> In general, they urge that any such process be no more regulatory than necessary, preserve the consumer electronics device manufacturers' ability to innovate, and not be allowed to be used as competitive weapons by companies whose technologies are already approved. If the

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<sup>35</sup> NPRM, at ¶ 6.

<sup>36</sup> NPRM, at ¶ 7.

Commission is to be involved in the role of adjudicator in the event of disagreement over approval of a specific technology, it should have to act within specific time frames.

E. Impact on Consumers

The impact on consumers<sup>37</sup> of any redistribution control scheme should be minimal. In this regard, the BPDG proposal promises to allow consumers to time-shift digital programming, as in the current analog environment. Only redistribution already illegal under the Copyright Act would be prevented by the proposed requirements.

F. Cost

It is Professional and Collegiate Sports' understanding that the cost to content owners of embedding content with the Broadcast Flag is expected to be minimal. If, in the unlikely event that the costs to content owners of the Broadcast Flag (or whatever technology is ultimately adopted to prevent unauthorized redistribution) turn out to be other than *de minimis*, the Commission should ensure that such costs are spread among affected parties. Costs to develop programming are already substantial, and content owners should not have to bear a disproportionate cost of establishing a necessary precondition for the availability of digital broadcast content.

G. Application of Fair Use Doctrine to Redistribution of Digital Broadcast Signals

Professional and Collegiate Sports wish to address the concerns of some organizations over the impact of the Broadcast Flag proposal on the type and scope of redistribution of digital broadcast television signals that would be considered a fair use. Fair use was a concern of some members of the BPDG, with one member requesting that "unauthorized redistribution" not be defined to include any redistribution that would be deemed "fair use" of content that a consumer

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<sup>37</sup> NPRM, at ¶ 9.

legitimately acquires.<sup>38</sup> However, Professional and Collegiate Sports urge that fair use principles not be allowed – either intentionally or unintentionally – to weaken whatever redistribution control scheme is ultimately adopted. Indeed, Professional and Collegiate Sports submit that application of the doctrine to the distribution of digital broadcast content may result in more limited amount of fair use than permitted in other contexts.

Fair use application to distribution of digital broadcast content is distinct from other applications of the doctrine because, unlike in an analog format, digital broadcast signals may be copied perfectly, in perpetuity and redistributed through the Internet nearly instantaneously, to a virtually unlimited number of people in and out of the U.S.<sup>39</sup> In other words, even a small amount of unauthorized redistribution can have grave consequences for the economic value of a digital broadcast signal. Under the fact-specific application of the fair use doctrine, the proportion of the work that is taken and the effect of the use on the potential market tilt the balancing of interests in favor of more restrictions on the redistribution of digital broadcast content.<sup>40</sup>

The potential negative impact on the Professional and Collegiate Sports' economic interests of the fair use doctrine is particularly acute with respect to the secondary market for sports content – its highlights. In other contexts, the appropriation of a small amount of content may be deemed a fair use; with sports highlights, however, the fifteen-second clip from a digital broadcast, when arranged with other highlights, becomes, in itself, the valuable commodity. Even if the *initial* use of a highlight redistributed over the Internet is for non-commercial

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<sup>38</sup> Final Report, at Section 2.12.2, n. 12.

<sup>39</sup> While, as noted, international cooperation is beyond the scope of the NPRM, Professional and Collegiate Sports note that fair use is a particularly U.S. concept not widely recognized in other jurisdictions. Accordingly, more restrictive application of the doctrine generally would not be inconsistent with international law, should the Broadcast Flag (or another technology ultimately adopted) eventually be adopted by other countries following the Commission's lead on digital broadcast copy protection.

<sup>40</sup> See 17 U.S.C. § 107 (including as factors “the amount and substantiality of the portion [of the copyright work],” and “the effect of the use on the potential market value for or value of the copyrighted work”).

purposes, the ease of further unauthorized use means that any subsequent redistribution of sports video highlights could quickly transform the distribution of a digital copy from an arguably fair use to an illegal appropriation of content. An expansive fair use application to the redistribution of digital broadcast signals would cause substantial injury to incentives of copyright owners, who otherwise have been able to market the rights to such clips.

Because of the susceptibility of digital broadcast signals to copying and widespread instantaneous distribution, copyright concerns surrounding digital broadcast signals differ markedly from those at issue in the Sony Betamax case,<sup>41</sup> in which home taping of analog broadcast content on VCRs was held to be a fair use. It should be emphasized that courts have stated that “generally, it may not constitute a fair use if the entire work is reproduced.”<sup>42</sup> Accordingly, any copies that are made in the digital broadcast environment beyond the *temporary* copies permitted under Sony Betamax are of inherently dubious legal status. The Commission should thus find no reason to be leery of the Broadcast Flag for the purpose of deference to any expansive view of fair use rights.<sup>43</sup> A more expansive fair use application to certain redistribution of digital broadcast signals could cause substantial injury to the incentives of copyright owners, a factor which militates against a finding of fair use.

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<sup>41</sup> Sony Corp. of America v. Universal City Studios, 416 U.S. 417 (1984).

<sup>42</sup> Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998).

<sup>43</sup> In any case, the Commission should be wary of coming to any decision based on generic “fair use” principles. The Copyright Office itself has raised the question of whether it is competent to make a rulemaking based on fair use principles or if such questions should be left to courts of competent jurisdiction. See Copyright Office, Mechanical and Digital Phonorecord Delivery Compulsory License, 66 FR 14099, 14102 (March 9, 2001).

Respectfully submitted,

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